EXHIBIT 5
DATE 2/4/2009
SB HB 276

MONTANA ASSOCIATION OF COUNTIES
LEGAL SERVICES

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MEMORANDUM

TO: House Judiciary Committee
FROM: Michael W. Sehestedt
Chief Legal Counsel
RE: House Bill 276
DATE: February 3, 2009

In the interest of saving time for the members of this Committee, I'd like to provide the bulk of my testimony in written form, and simply remark on what I consider to be a couple of the more serious deficiencies in House Bill 276.

BACKGROUND

Existing law regarding the provision of medical care for arrested persons in Montana is reasonably clear. Issues that have arisen have been resolved either by legislative action or judicial decision, and the responsibilities of counties for the medical care of arrested persons and persons actually detained by the county are clearly established.

As a matter of Constitutional law now so well established as to be beyond question, any person in custody is entitled to necessary medical care; and it is the Constitutional duty of the custodial governmental agency to see that necessary medical care is provided. Deliberate indifference to the serious medical needs of a person in custody is a violation of that person's constitutional rights actionable under 42 USC 1983.

This Constitutional duty is as well established under existing Montana law as is the responsibility for payment of these costs if the arrested offender is unable to pay. In *Montana Deaconess Medical Center v. Johnson* (cited in the preamble to this Bill), the Montana Supreme Court unequivocally held that, when a person placed under arrest and taken to the hospital was unable to pay for the needed medical care, the county in which the arrest occurred was responsible for payment of the medical costs incurred. Nothing has changed that basic principle, although subsequent legislation has made medical costs for inmates detained by state agencies the responsibility of the state.

Arrest is a defined and established event in Montana law. It is defined by §46-1-202(3) in the following terms: "'Arrest' means taking a person into custody in the manner

authorized by law." The courts have been quite clear that placing a person under arrest does not require any particular form of words; it merely requires that the officers deprive the individual of his or her freedom. From the point when a person is not free to leave, that person is under arrest whether the magic words "you are under arrest" were spoken or not. In those rare cases where there is some question as to whether or not a person was arrested, the courts are uniquely qualified to make the determination. There is no reason to think making that determination would be more difficult in the context of responsibility for medical claims than it would be in the context of a criminal case, questioning, for example, the admissibility of a confession.

THE SHORT TITLE OF THE BILL IS MISLEADING

While of no great legal importance, it should be noted for the record that the short title of this Bill is misleading. The short title used in the indexing of bills and in the notice of hearings is: **"Clarify responsibility for person injured by law enforcement."** Even a cursory reading of the bill indicates that goes far beyond just addressing the cost of medical care for a "person injured by law enforcement." The Bill in fact creates at least potential county responsibility for every traffic injury for which a ticket might be issued, since the hospitals and other providers will be able to argue that every injured reckless driver who is brought in for medical treatment would "likely be placed under arrest except for the person's need for immediate medical attention." The same argument could also be advanced for an injured driver who was operating a motor vehicle without a valid license or without liability insurance coverage. The responsibilities created by this Bill go far beyond those instances in which a person is injured by law enforcement.

THE BILL AS DRAFTED CREATES AMBIGUITIES WHICH WILL BE THE SOURCE OF FUTURE LITIGATION

This Bill proposes to upset that clear-cut line of demarcation for the responsibility of a county to a medical provider for medical care provided to an indigent offender. Under current law, this responsibility begins at the point of arrest; a point clearly established by both statute and case law.

The Bill will impose liability on counties for the medical care not only of arrested persons but of persons who have been taken into the undefined term of "custody" or the even more undefined term of "presumed custody" by a law enforcement officer. If the ambiguity created by the foregoing was not sufficient to blur the existing line of responsibility, the Bill goes on to include in the class of indigent persons for whom

counties will be responsible those who "would likely be placed under arrest except for the person's need for immediate medical attention." [See Section 1. (1)(b).]

The ambiguity created by this Bill will be a fruitful source of litigation for years. Particularly troubling is the language "would be likely to be placed under arrest", which manifestly fails to recognize the decision to arrest without a warrant is a serious matter for an officer and is based on a multitude of factors, including but not limited to the strength of the evidence in the officer's possession at the time the decision is made, the threat the potential offender poses to him or herself or to others, the danger that the offender will destroy evidence if left at liberty, and the possibility the offender will flee the jurisdiction. Even if an officer feels there is sufficient probable cause for an arrest, in minor offenses, particularly traffic offenses, officers are encouraged to write a ticket with a notice to appear rather than to arrest the offender. Under this Bill, the decision made through balanced judgment of an officer of the law will be subject to repeated second-guessing by medical providers looking for a deep pocket.

While not frequent, on occasion an individual is, as the preamble to the Bill states, "unarrested." This can happen in variety of situations. For example, a superior officer or prosecutor may determine the initial determination of probable cause was erroneous or that subsequently discovered facts have rendered initial determination of probable cause questionable. In other cases, the prosecutor may believe additional information is needed to determine either the level of the charges or whether criminal charges are even appropriate. It is not a cynical process used to avoid medical costs. As drafted, this Bill would make those decisions the subject of litigation, not based on public safety and the proper administration of justice but, rather, based on the claims of medical providers.

MANY PROVISIONS OF THE BILL ARE UNNECESSARY

To the extent the Bill in Section (4)(a)(ii) and (iii) requires payment for medical screening prior to incarceration and for medical testing requested by an officer, current law already requires such payment. Clearly, screening prior to incarceration can by definition relate only to arrested persons who are on their way to jail. Under current law, once an indigent offender is arrested, the county becomes responsible for medical care if the arrest is based on a violation of state law. Similarly, when a service such as drug or alcohol testing is requested by a law enforcement officer, under normal contract principles, the officer (or the agency employing the officer) is obligated to pay for the service. Such testing is clearly outside the provision of necessary medical care and would relate to the gathering of evidence for a criminal case or, in the case of an

arrested person, whether or not the person could be safely placed in detention. In either case under existing law, there is no question the requesting agency is obligated to pay.

THE BILL REDUCES ANY INCENTIVE FOR THE HOSPITALTO COLLECT FROM THE OFFENDER OR THE OFFENDER'S INSURANCE

Current law requires the county to pay for medical costs only after the provider has been unable to collect from the inmate or third party payer within 120 days of the service. This Bill eliminates any requirement for good faith collection efforts by the medical provider and requires payment of medical costs that the hospital has not collected from the inmate or a third party payer by the county within 30 days of the date the service was rendered. In practice, what this means is that the medical providers are washing their hands of any responsibility or role in collecting payments even from insured offenders and passing that responsibility on to counties.

Further, by making the payment due within 30 days of the date of service, HB 276 creates yet another source of complaint, in that most medical billing takes some period of time and a large portion of the 30 days will likely have expired before the county even sees a bill. Since the disbursement of public funds is not as simple as simply writing a check, there will be endless complaints of violations by late payment. In my albeit limited personal experience with medical billing, a bill is first submitted to my insurance company, and after the insurance company has paid the amounts covered, I get a second bill reflecting how much is my responsibility. Payment for that bill is then due within 30 days. As written, HB 276 does not even give counties 30 days from the date they are billed to make payment. It certainly does not allow time for the medical provider to make any attempt to collect from anyone other than the county.

THE BILL ELIMINATES ANY POSSIBLITY OF NEGOTIATION ON THE RATE OF PAYMENT FOR INDIGENT INMATES

For no apparent reason, HB 276 eliminates the provision for a negotiated rate of payment. Under existing law, medical providers are to be to be reimbursed by the county at "the Medicaid reimbursement rate or at a rate which is 70% of the provider's customary charges, whichever is greater" or "at a negotiated rate." For no discernable reason, this Bill eliminates the option of a negotiated rate. What this means is that each charge needs to be tested first against the Medicaid rate and then against 70% of the provider's "customary charges." If customary charges are used, the question of how such charges are established and justified may become an issue. As with any entity expending public funds, counties have a responsibility to make sure they are not being

overcharged. Under current law this can be addressed by negotiation before the bills come in, to establish a rate or methodology that is mutually agreed upon. With advance negotiation no longer a possibility, an item-by-item justification of the amount charged for each bill becomes a real possibility.

THE BILL MAKES THE HOSPITAL THE FINAL AUTHORITY ON WHAT SECURITY IS NECESSARY

Section 1.(4)(c) of HB 276 states the county "shall provide all additional security required by the hospital." Clearly, if a person is under arrest and a threat to others or an escape threat, the county should be responsible for the security the sheriff deems necessary. The decision as to what level of security is necessary is a law enforcement and not a medical decision. The sheriff is uniquely suited to make this decision and a medical provider is not. If a person is not under arrest, the sheriff is again better suited to determine whether the threat of harm merits assignment of public resources to protect the public peace. If the sheriff determines there is no threat, his or her decision should be honored at least insofar as the expenditure of public funds is concerned. As written, this Bill makes the hospital the sole decision-maker regarding security to be provided because of its concern for patients; yet, the hospital would have no consequences attached to its demand for security.

SUMMARY

HB 276 as currently written upsets established law, creates the basis for future litigation, addresses issues already resolved by existing law, absolves hospitals from any responsibility for collecting from the patient for services rendered, requires county payment of medical bills on a time frame so short as to be virtually impossible to meet, and gives a hospital's unfettered discretion to require, at county expense, security for any patient.